POWLEY | GIBSON

Robert L. Powley
Partner
rlpowley@powleygibson.com

VIA ECF

March 22, 2016

The Honorable P. Kevin Castel
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *Energy Intelligence Group, Inc. et al v. Scotia Capital (USA) Inc.* (1:16-cv-00617)
Initial Pretrial Conference - Joint Letter Submission

Your Honor:

The parties to the above-referenced action submit this joint letter pursuant to paragraph 4 of Your Honor's Initial Pretrial Conference Order (Doc. No. 7), and in anticipation of the Initial Pretrial Conference scheduled in this case for March 29, 2016, at 10:30 a.m.

1. **Description of The Case**

Plaintiffs' Position

This is an action for copyright infringement. Plaintiffs Energy Intelligence Group, Inc. and Energy Intelligence Group (UK) Limited bring claims against Defendant Scotia Capital (USA) Inc. for infringement of the copyrights in Plaintiffs' publications *Oil Market Intelligence* (OMI), *Energy Intelligence Briefing* (EIB), *Oil Daily* (OD) and *Petroleum Intelligence Weekly* (PIW). Upon information and belief, and based on representations made to Plaintiffs by Defendant's employee, Defendant has been systematically and continuously making copies of Plaintiffs' publications on its private, secure email and computer systems and distributing them within its organization. Defendant never contacted Plaintiffs to seek permission for its action despite numerous copyright warnings and copyright notices. Plaintiffs seek resolution of the following major issues: (1) whether and to what extent Defendant infringed Plaintiffs' copyrights in each of OMI, EIB, OD and PIW; (2) whether Defendant did so willfully, and (3) whether and to what extent are Plaintiffs entitled to recover damages, costs and attorneys' fees.

POWLEY|GIBSON

Defendants' Position

EIG has sued Scotia for alleged copyright infringement in connection with EIG's subscription-based publications entitled Oil Market Intelligence ("OMI"), Energy Intelligence Briefing ("EIB"), Oil Daily ("OD"), and Petroleum Intelligence Weekly ("PIW") (collectively "the EIG Publications"). EIG alleges that although Scotia has maintained "single-copy subscription agreements" to the EIG Publications, Scotia has "willfully copied and distributed" them in violation of copyrights EIG purports to hold in the EIG Publications. (Compl. at ¶¶ 93-95 (OMI), ¶¶ 104-106 (EIB), ¶¶ 115-117 (OD), and ¶¶126-128 (PIW).)

EIG's suit against Scotia is part of a large-scale litigation campaign that EIG has been pursuing against over fifty (50) other defendants, both inside and outside this district, since at least 2008. EIG's litigation campaign seeks not to curb any misuse of its subscription agreements, or to recoup any actual damages suffered – which can easily be done, and should have been done, through simple, non-litigation means – but rather to exploit the statutory damages provisions of the Copyright Act to seek a windfall of vastly disproportionate damages awards for unwitting acts of infringement by subscribers.

Although Scotia has not yet answered or moved against the Complaint, Scotia anticipates asserting numerous defenses that may bar EIG's claims in whole or in part, including, among others: (1) failure to state a claim upon which relief can be granted; (2) fair use; (3) equitable defenses such as laches, estoppel, waiver, implied license, and/or acquiescence; (4) invalidity or unenforceability of copyright; (5) failure to mitigate damages, (6) misuse of copyright; (7) lack of ownership; (8) lack of copyrightable subject matter; and (9) no willful infringement.

2. Contemplated Motions

Plaintiffs' Position

Plaintiffs do not contemplate filing any motions at this time, but anticipate moving for summary judgment on the issue of liability after completing discovery.

Defendant's Position

Scotia anticipates responding to the initial Complaint by filing a Rule 12 motion to dismiss and/or strike. Scotia further anticipates filing at least one motion for summary judgment of invalidity or unenforceability of copyright as to one or more of the EIG Publications under Fed. R. Civ. P. 56. Scotia further contemplates that it may uncover facts through discovery that will form the bases of additional motions to be filed in the case.

3. Prospect For Settlement

Plaintiffs' Position

The Parties held a settlement conference on November 19, 2015, but were unable to reach an agreement. Prior to the conference, the parties exchanged limited information concerning Plaintiffs' allegations, which was insufficient for the parties to reach an agreement. Plaintiffs maintain that a mutual understanding of the full nature and extent of Defendant's copyright infringement is necessary to engage in further constructive settlement discussions. Plaintiffs are amenable to holding further settlement discussions between the parties in accordance with Your Honor's Civil Case Management Plan and Scheduling Order, which sets the deadline for settlement discussions within fourteen (14) days following the close of fact discovery. Plaintiffs are also amenable to mediation with a privately-retained mediator, following the close of fact discovery.

Defendant's Position

The parties have engaged in formal settlement discussions, including an in-person settlement meeting held in New York on November 19, 2015 with representatives of both parties present, and have exchanged extensive informal discovery, but have not reached a settlement. Although the parties have reached an impasse with respect to the amount of any potential monetary settlement, Scotia strongly believes that an early settlement conference before Magistrate Judge Fox would help the parties overcome this impasse. Accordingly, Scotia remains optimistic about the prospect of reaching a settlement in the near future with the Court's assistance. The following is a summary of the parties' settlement efforts to date.

Scotia first learned of EIG's claims by letter dated August 25, 2015. Scotia immediately conducted an investigation into the allegations raised by EIG, and responded by letter dated September 25, 2015. The parties exchanged several letters in connection with Scotia's investigation into the allegations raised by EIG, culminating in an in-person settlement meeting held in New York on November 19, 2015 with representatives of both parties present. EIG made an initial settlement demand following the November meeting, which Scotia countered on December 22, 2015. The parties exchanged several rounds of correspondence thereafter (on December 31, 2015, January 11, 2016 and January 27, 2016). Over the course of the correspondence, Scotia has provided detailed information about the use of the EIG Publications within the company, for the purpose of resolving this dispute. The parties reached an impasse with respect to the amount of any potential monetary settlement, but it appears to Scotia that the parties were not very far apart before EIG filed the Complaint.

POWLEY | GIBSON

Accordingly, Scotia strongly believes that an early settlement conference with Magistrate Judge Fox – within thirty (30) days of the March 29, 2016 Case Management Conference, or as soon thereafter as practicable – would be beneficial and would conserve the Court's and the parties' resources. Scotia believes that no further discovery is required for a meaningful settlement conference, but if EIG believes some specific additional facts are necessary, Scotia would consider any such settlement-related requests.

Very Truly Yours,

POWLEY & GIBSON, P.C.
Attorneys For Plaintiffs

By: */s/ Robert L. Powley*
Robert L. Powley
304 Hudson St., Suite 202
New York, NY 10013
Telephone: (212) 226-5054
Facsimile: (212) 226-5085
rlpowley@powleygibson.com

MAYER BROWN LLP
Attorneys for Defendant

By: */s/ A. John P. Mancini*
A. John P. Mancini
1221 Avenue of the Americas
New York, NY 10020-1001
Telephone: (212) 506-2295
Facsimile: (212) 849-5895
jmancini@mayerbrown.com